

Truth, Error, and Criminal Law

An Essay in Legal Epistemology

This book treats problems in the epistemology of the law. Beginning with the premise that the principal function of a criminal trial is to find out the truth about a crime, Larry Laudan examines the rules of evidence and procedure that would be appropriate if the discovery of the truth were, as higher courts routinely claim, the overriding aim of the criminal justice system. Laudan mounts a systematic critique of existing rules and procedures that are obstacles to that quest. He also examines issues of error distribution by offering the first integrated analysis of the various mechanisms – the standard of proof, the benefit of the doubt, the presumption of innocence, and the burden of proof – for implementing society's view about the relative importance of the errors that can occur in a trial.

Larry Laudan is Principal Investigator at the Instituto de Investigaciones Filosóficas, Universidad Nacional Autónoma de México. He is the author of many books, including *Progress and Its Problems*, *Science and Values*, and *Beyond Positivism and Relativism*. He is a former divisional president of the American Philosophical Association.

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Larry Laudan

Universidad Nacional Autónoma de México



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Acquitting the guilty and condemning the innocent – the Lord detests them both.

– Proverbs 17:15

As there is the possibility of a mistake, and as it is even probable, nay, morally certain that sooner or later the mistake will be made, and an innocent person made to suffer, and as that mistake may happen at the very next trial, therefore no more trials should be had and courts of justice must be condemned.

W. May, *Some Rules of Evidence*, 10 AMER. L. REV. 642, at 654–5 (1876)

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Preface

Every author owes debts more numerous than he can mention. Of some, he is barely aware, though they are no less real for that. More troubling are those that run so deeply that they cannot easily if ever be repaid, and certainly not by the bare acknowledgment of their existence. Still, it remains important to mention them, even if the gesture is brief and fleeting.

I first became interested in epistemological issues surrounding the law about five years ago, having previously devoted myself to the philosophy of science and applied epistemology. More by accident than by design, my earliest encounters with academic law occurred at the University of Texas, where I often go to consult books unavailable in Mexico, where I work. On one of my annual trips north of the border, I decided to stop into the office of Brian Leiter in the University of Texas Law School. I had, by chance, been reading a classic legal case, *In re Winship*, a few days before. Leiter and I did not know one another, but something was bothering me and I knew his reputation as one of the few philosophers of law with an interest in questions of proof. After introducing myself, I asked him (more or less): “I can’t make sense of what the court is saying about proof beyond a reasonable doubt. Can you straighten me out?” After puzzling over the relevant passages, he replied candidly: “No.”

This book dates from that conversation. Probably as much to get me out of his hair as anything else, Brian put me onto LexisNexis, that wonderful repository of all things legal on the Internet. I started reading other Supreme Court cases discussing reasonable doubt, hoping that would set me straight. It did not. This book is the end product of my quest for an answer to that initial and seemingly innocuous question. As these things always do, my puzzle about reasonable doubt mushroomed into worries about a plethora of epistemic notions (the benefit of the doubt, the presumption of innocence, the burden of proof, relevance, and reliability) widely used by the judiciary and academic lawyers alike. The nagging worry was that key parts of *all* these notions (especially proof, relevance, and reliability) were being used in ways that were not only nonstandard (at least among philosophers) but also, apparently, deeply confused. The more I

read, the more uneasy I became. Senior jurists, including those on the Supreme Court, often wrote about knowledge and truth seeking in ways that I found foreign and unfamiliar. Sometimes, they seemed plainly wrong.

At about this point, I came to know Ron Allen, the Wigmore Professor of Evidence Law at Northwestern, whose work I had read and from which I have learned much. Even when we disagreed, which was not often, I felt that we were in the same conceptual universe, committed to the idea of analyzing a trial as the search for the truth about a crime. Besides, we shared a knee-jerk aversion to the Bayesian project in the law and elsewhere, so I knew he had to be on the side of the angels.

A year later, I finally stumbled upon the article that I had been looking for in Leiter's office that day almost two years earlier: a cogent and sophisticated treatment of the standard of proof beyond a reasonable doubt. It was written by a young legal scholar, Erik Lillquist from Seton Hall Law School, from whom I have also learned much.

Fortuitously, some funds from the Institute for Philosophical Investigation at my university made it possible for my colleague Juan Cruz Parcerro and me to invite several scholars to the campus for three days of intensive conversations about law and epistemology in December 2003. Apart from Allen and Lillquist, two other scholars attending that meeting made a deep impression on me. They were Michele Taruffo from Pavia and Jordi Ferrer from the University of Gerona. Politely overlooking the fact that I was neither a lawyer nor a philosopher of law, both of them heightened my awareness of a number of problems that I had barely stumbled on in my own halting efforts with LexisNexis. Above all, they persuaded me that – where the law of evidence is concerned – the traditional gulf postulated between Roman and Anglo-Saxon law was ill-founded. Both civilian and common law courts face similar problems of proof and evidence, and it had been simply parochial of me to imagine that an appropriate dialogue about evidence could be conducted within the terms of reference of a single legal system. Living and working in Mexico, as I do, reinforced that impression, since I spend much of my time explaining the mysteries and idiosyncrasies of Anglo-Saxon procedure to Mexicans and likewise learning about those of the Mexican system. As I subsequently discovered, Taruffo has written a splendid volume in Italian, *The Proof of Judicial Facts*, that is, in my judgment, the best current book on the theory of legal proof. (It is a scandal, but symptomatic of the problem I just mentioned, that there is no English translation of it.) My examination of the parallels between Mexican and U.S. law has been enormously aided by my friend Enrique Cáceres of the Institute for Jurisprudence at the National Autonomous University of Mexico (UNAM), whose knowledge of Mexican jurisprudence is more than merely impressive.

Two years ago, the Law School at the University of Texas invited me to put together an advanced seminar in legal epistemology. Along with the patient students who suffered through my first shot at writing this book, a very bright

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philosopher of law, Les Greene, regularly participated. His sagacious questions saved me from some of the serious errors into which I was falling. Outside the law itself, I must mention my continuing debt to Deborah Mayo's penetrating analyses of the nature of error and the logic of the design of statistical tests.

Closer to home, I am grateful to my colleagues at UNAM, who batted nary an eyelash when I announced to them that I was taking time off for a couple of years from my duties as philosopher of science to learn something about the law. But for their generous provision of time for study-leave, it would have been impossible to write this book. Finally, I want to acknowledge a deep indebtedness to my wife, Rachel, who (among many other things) worked very hard – but with limited success – to make this book intelligible to nonspecialists.

Two chapters of this book (2 and 4) are much-altered versions of articles that have appeared or will soon appear in *Legal Theory*. I remain humbled that the editors of that distinguished journal (Larry Alexander, Jules Coleman, and Brian Leiter) were willing to take a total outsider under their collective wing.

Guanajuato, México
1 August 2005

Abbreviations and Acronyms Used

BARD: beyond a reasonable doubt
BoD: benefit of the doubt
BoP: burden of proof
CACE: clear and convincing evidence
guilt_m: material guilt
guilt_p: probatory guilt
innocence_m: material innocence
innocence_p: probatory innocence
m: ratio of true acquittals to false convictions
n: ratio of false acquittals to false convictions
PI: presumption of innocence
PoE: preponderance of the evidence
SoP: standard of proof